JUDGE TIMOTHY P. CONNORS
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ANN ARBOR, MI

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Michigan State Court Administrator's Office
Court Improvement Program

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Michigan Judges Association

MEMBER: National Council of Juvenile and Family Court Judges Tribal Leadership Forum

MEMBER: Judicial Cross Roads Task Force
Michigan State Bar Association

AUTHOR: Our Children are Sacred: Why the Indian Child Welfare Act Matters
American Bar Association, Judges' Journal,
Volume 50, Number 2, Spring 2011

(included in your packet)

- Federal Indian Child Welfare Act (ICWA) is existing and controlling law for every State Court Nationwide.

- Progressive States have legislatively affirmed ICWA to increase compliance.

- Increased compliance decreases costs.

- Decreased costs include:

  - Financial (proper adjudication in a timely manner)

  - Human (permanency for children/certainty for families)

  - Reputation (States recognizing and following the Rule of Law)

REFEREES QUARTERLY

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NO RESOURCE MORE VITAL THAN OUR CHILDREN
The Michigan Indian Family Preservation Act
TIME FOR AFFIRMATION

Contributed by Judge Tim Connors and Millie J. Humphrey

INSIDE THIS ISSUE OF REFEREES QUARTERLY:

Judge Tim Connors

On Thursday, September 27, 2012, the Senate passed the Michigan Indian Family Preservation Act (The "MIFPA," Senate Bill No. 1232) with a majority vote, 36-2[1]. On September 12, 2012 – just weeks after its introduction to the Senate and concurrent referral to the Families, Seniors and Human Services Committee on August 15, 2012 – several Indian Law experts offered favorable testimony at the Committee's public hearing in the state's capital. With the Senate passage of S.B. 1232 the State of Michigan, respecting its government-to-government relationship with its Indian tribes, grows closer to a living resolution for case management in child custody proceedings. Congress's thirty-four-year-old observation of our Indian children announced with the enactment of the Federal Indian Child Welfare Act ("ICWA")[2] remains true today: "[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children..."[3] The MIFPA echoes and affirms this sentiment.

Why Michigan Needs Its Own ICWA Legislation

If ICWA is the existing and controlling law for every state court nationwide, then why does Michigan need its own ICWA legislation? The answer is simple. It will increase state court compliance, and increased compliance decreases costs. Adopting the MIFPA would yield promising financial and human benefits as well as distinguish Michigan as one among other progressive states that have enacted affirming legislation.

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NO RESOURCE MORE VITAL THAN OUR CHILDREN
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TIME FOR AFFIRMATION

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By Judge Tim Connors
and Millie J. Humphrey

In its 1979 *Guidelines for State Courts; Indian Child Custody Proceedings*, the Bureau of Indian Affairs (BIA) encouraged legislative affirmation by the individual states.[4] The federal law establishes bare minimum standards for protection. States are free to enact legislation which affords even greater protection for children and tribes. The State of Washington, for example, expanded their State Law last year to include protection for Canadian Tribes. MIFPA essentially affirms and clarifies the existing law. Under MIFPA, if a child is eligible for membership in a federally recognized tribe, that child fits within the definition of an Indian Child, regardless of whether or not the parent is a member. Similarly, if a child is a ward of the tribal court, the tribal court has exclusive jurisdiction, regardless of whether the child is "an Indian child".

When the ICWA was enacted, there were five federally recognized tribes in Michigan. Today, there are twelve.[5] As Tribal Judge Mike Petoskey says, "If it was a good idea then (state legislative affirmation), it is a **great** idea now!"[6] The emergent presence of our tribal neighbors, through more meaningful access to state court review, has resulted in a rise in Indian child custody proceedings. These increased encounters between Indian children and state courts not only demand that those professionals involved in child custody proceedings (foster care placement, juvenile guardianship, termination of parental rights, pre-adoptive placement, temporary placement, adoptive placement, permanent placement, and the like) respond promptly, but also that we respond properly to manage and adjudicate our caseloads. Proper notice of proceedings ensures due process for tribes. Inadequate adjudication delays legally appropriate resolution. That delay prolongs unnecessary placement in foster care. The estimated cost per child, per month, in foster care is $2,000.00.[7] Obviously, increased compliance decreases this financial cost.

There is, however, a far greater cost to noncompliance than the financial cost. That is the cost to our children and to our families. Permanency for our children and certainty for our families is always a paramount concern. Noncompliance contradicts adherence to that concern. Many state actors in the adoption system are aware of the *In re Baby Jessica* case.[8] Failure to appropriately notify legally interested parties in that case (a non-ICWA case), and the subsequent failure to address their legal rights once their identities were known, resulted in catastrophic uncertainty for the child, the biological family, and the adoptive family. As decision-makers we

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and Mollie I Humphrey

bear no greater burden than the responsibility for the children and families we serve, and for our errors in application of the law.

Finally, increased compliance decreases costs to our institutional reputation. As Shingwaukonse ("Little Pine")[9] so poignantly stated, "I would have been better pleased if you had never made such promises than that you should have made them and not performed them." Noncompliance by state court systems of this law confirms distrust and creates perceptions of our motivations beyond ignorance. That distrust and those perceptions have long-term ramifications for future relationships and outcomes. Succinctly, Michigan's reputation is at stake. With the introduction and passage of MIFPA, Michigan affirms to the rest of the nation, and to the citizens within its borders, that it honors and follows the law.

Our neighbors, through resolution from the United Tribes,[10] have asked us to pass this legislation in honor of and commitment to our promise. Our State Bar, in its Judicial Crossroads Report,[11] specifically recommended state legislative enactment of the federal law. Our Michigan Judges Association has passed a resolution in support. In January 2011, The National Council of Juvenile and Family Court Judges passed a resolution[12] for increased compliance by state courts with the letter and the spirit of the Indian Child Welfare Act. That same resolution acknowledged that the Tribal Courts have historically not been regarded as equal in status with the state courts in that, as a result, the Tribal Courts and the children and families served by the Tribal Courts have been denied many of the resources available to the state courts. As individual judges and referees, now is the time to demonstrate our commitment to closing that gap through our thoughts, our words, and our deeds.

What is the Current Status of the Bill

S.B.1232 awaits its passage by the House of Representatives. The MIFPA will be in full effect once the identical version of the bill - the enrolled bill - is passed by both the Senate and House. Its passage would be a positive and significant milestone in Michigan's history. As referees and judges, as decision-makers,

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NO RESOURCE MORE VITAL THAN OUR CHILDREN
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we have a unique opportunity to ensure compliance with both the letter and the spirit of the Act. This is the embodiment of the oath of office we all took in order to serve. It is our duty, our legal obligation, and our moral responsibility.

---

1 *Senate Bill S.B.1232*, MIRSNEWS.COM, http://www.mirsnews.com/bill_details.php?id=24121 (last visited Oct. 13, 2012).

2 25 U.S.C. § 1901-63.

3 25 U.S.C. § 3201 (Supp. V 2006) ("Findings and Purpose").

4 Guidelines for State Courts; Indian Child Custody Proceedings. 44 Fed. Reg. 67,584 (Dep't of Interior Nov. 26, 1979) (explaining that "[t]hese guidelines are not intended to discourage [state] action").

5 *Mich. Tribal Gov'ts*, MICHIGAN.GOV, http://www.michigan.gov/som/0,1607,7-192-29701419O9---,00.html (last visited Oct. 14, 2012).

6 Speech at 2012 Adoption and Permanency Forum, Jackson, Michigan 9/27/12

7 Marilisa Kinney Sachteleben, *Mich. Governor Signs Extended Foster Care Benefits Law*, YAHOO!, Nov. 23, 2011, http://news.yahoo.com/michigan-governor-signs-extended-foster-care-benefits-law-193100199.html (last visited Oct. 14, 2012) ("DHS projects that foster care costs about $24,500 per year per individual.").

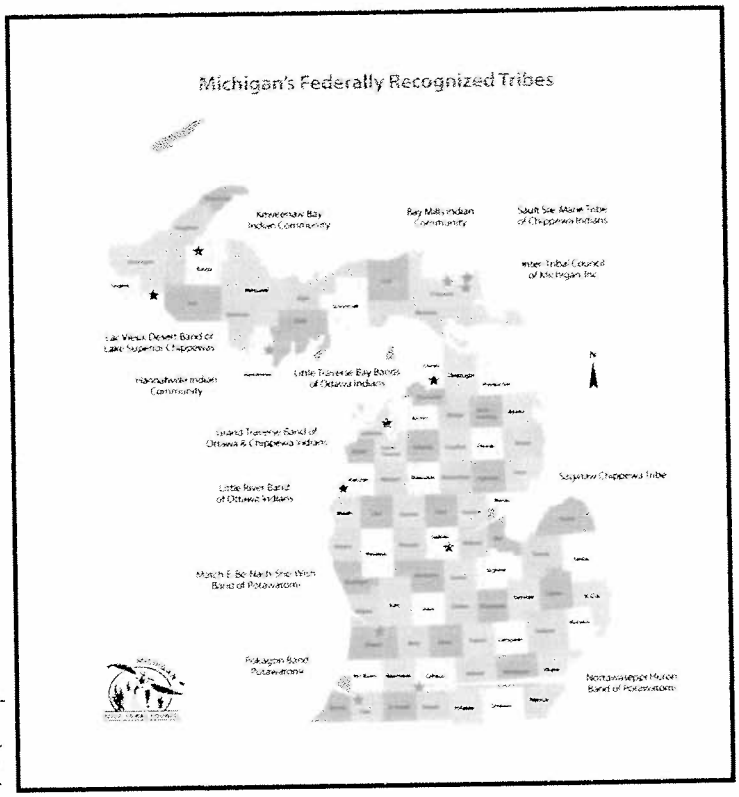
8 DeBoer by Darrow v. DeBoer, 509 U.S. 938, 114 (1993).

9 Native Am. Leader of the Ojibway Cmty. (1790-1854).

10 http://www.unitedtribesofmichigan.org/index.aspx (United Tribes of Mich.).

11 State Bar of Mich., *Report of the ATJ* Comm., JUDICIAL CROSSROADS TASK FORCE, June 10, 2010, available at http://www.michbar.org/generalinfo/jcft_only/TJCrossroadsFullReport.pdf ("Support the enactment of federal ICWA concepts into Michigan law.").

12 *Resolution in Support of Tribal* Courts, NCJFCJ (2011), http://www.ncjfcj.org/sites/default/files/final.tribalcourtssupportresolution.1.11_0.pdf.



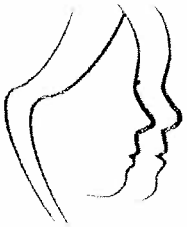
Judge Tim Connors is a Circuit Court Judge in Ann Arbor, Michigan. He chairs the Tribal-State Court Relations Committee for the Michigan Court Improvement Program. He also chairs the same ad hoc committee for the Michigan Judges Association.

Millie J. Humphrey is a student at Thomas M. Cooley Law School expecting her J.D. in January 2013. She is currently Judicial Intern for the Hon. Judge Timothy P. Connors, and is taking his course in Federal Indian Law. She pursues a career in Child Advocacy.

Identification of ICWA Eligible Children and Compliance with ICWA Requirements

January 1, 2009 through June 30, 2012

November 14, 2012



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Midwest Child Welfare Implementation Center

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INTRODUCTION:

The following tables were developed from eWiSACWIS data on children in out of home placement for calendar years 2009, 2010, 2011, and January through June of 2012. Data is presented by 6 month period. A child is included in a 6 month period if his or her most recent placement episode ended within that time frame[1]. Numbers and percentages in this report are based only on the most recent placement episode[2] in order to provide an unduplicated count of children. Information is shown in the tables for "tribal count", "ICWA child", "ICWA notice", "tribal provider" and "relative placement".

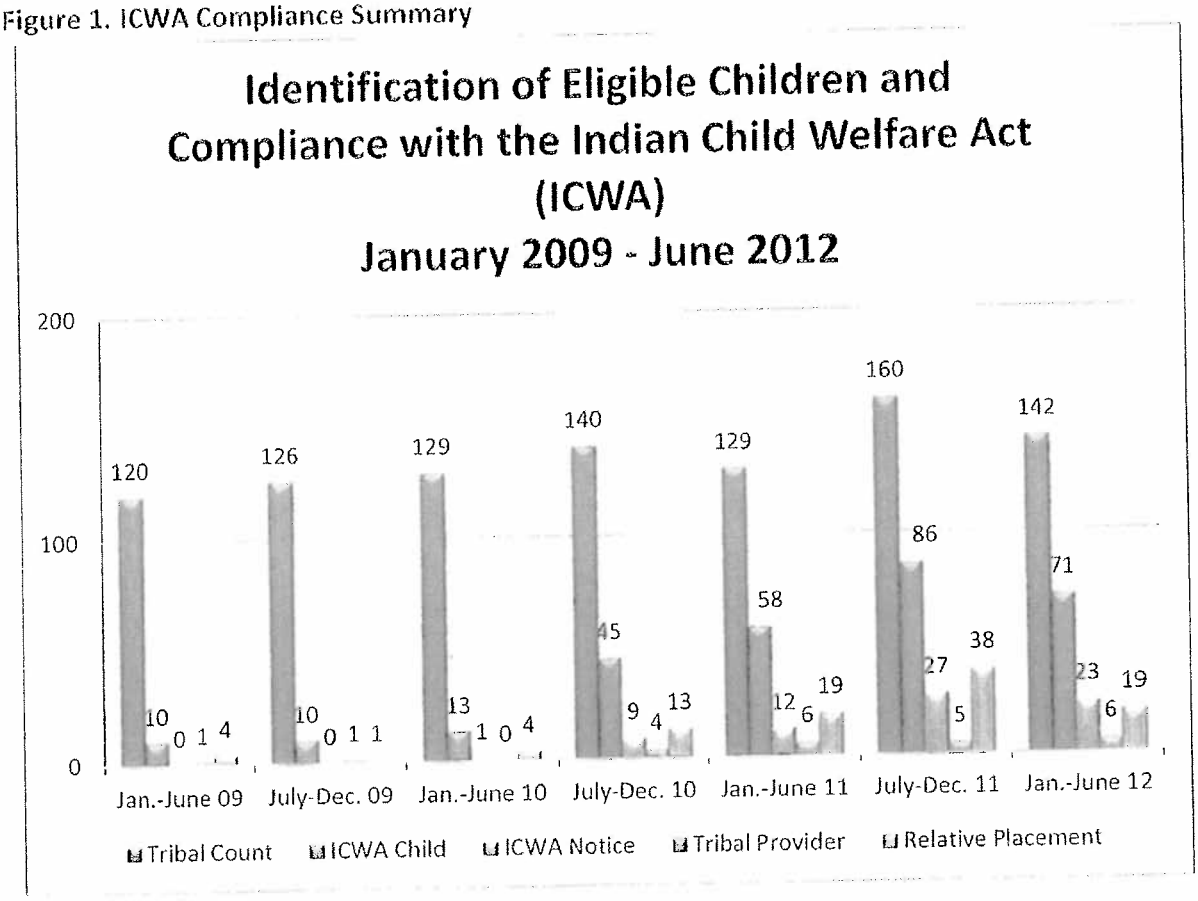
Tribal count includes all children identified in eWiSACWIS as American Indian based on race/ethnicity, tribal membership, or placement with a tribal provider. ICWA child counts include all children who are members of a tribe or eligible for membership. ICWA notice is the number of children for whom tribal representatives were notified. Information on tribal providers and relative placement is provided as a means of tracking changes over time in use of preferred placement options under ICWA. Tribal provider is a count of children placed with licensed tribal providers, and relative placement includes children with placement types in eWiSACWIS of "kinship care-court ordered", "relative-unlicensed", "foster family home-relative", "foster family home-relative-court ordered", and "treatment foster home-relative".

Figure 1 below summarizes this information statewide for 2009 through June 2012. Figures 2 through 11 provide additional detail for the counts presented in Figure 1. Trends in tribal count, children identified who are subject to ICWA, notifications to the tribes, and placement[3] in accord with ICWA preferred options are shown as both numbers and percentages.

[1] The end of a placement episode is identified by a value of "yes" on the eWiSACWIS discharge flag. Children whose most recent placement episode is still open are not included in the tables.
[2] A small percentage of American Indian children (6.7%) had multiple episodes of care ending within the study period. For these children only the most recent episode of out of home care is represented in the tables.
[3] Placement information reflects the most recent placement only.

STATEWIDE ANALYSIS:

Figure 1. ICWA Compliance Summary



As shown in Figure 1:

- On average, numbers of children identified as American Indian in the tribal count have risen slightly since the ICWA tab was instituted in the second half of 2010.
- Numbers of children identified as subject to ICWA began to increase in the last half of 2010 and continued to rise through the second half of 2011. Numbers have dropped slightly in the first half of 2012, mirroring a decrease in number of American Indian children identified in the tribal count. However, they remain high relative to numbers obtained prior to the introduction of the ICWA tab.
- There have been smaller increases since the latter half of 2010 in numbers of notices sent to tribal representatives, placements with tribal providers, and placements with relatives.

Figure 2. Number of American Indian Children Identified in eWiSACWIS by Six Month Period

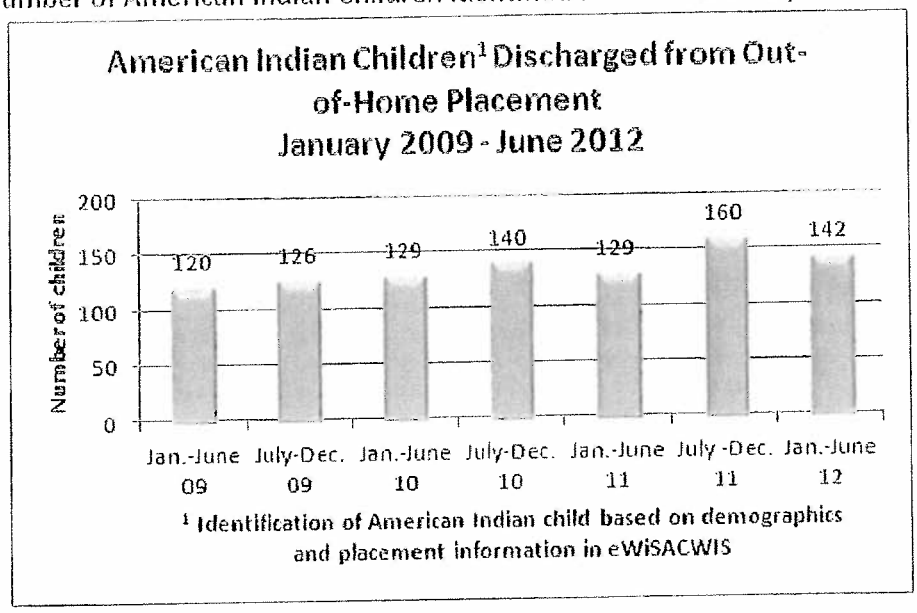
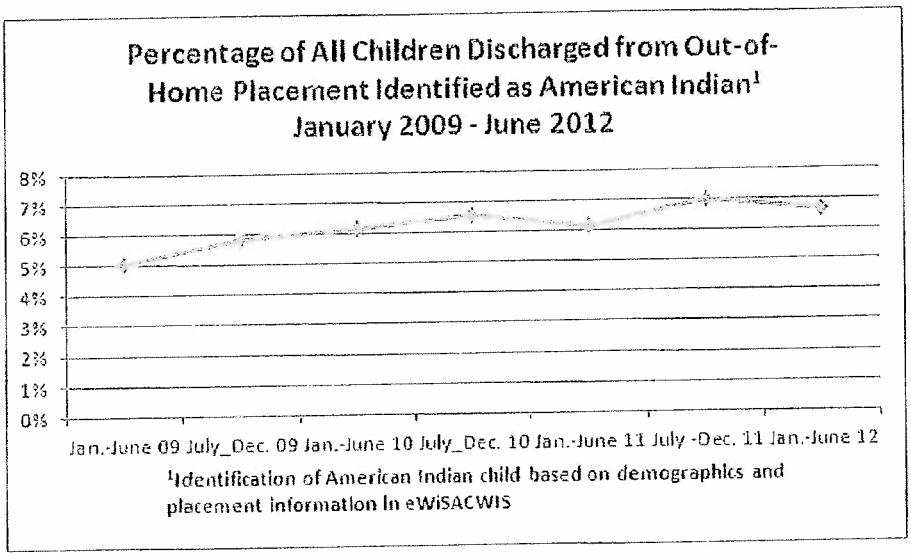


Figure 3. Percentage of American Indian Children Identified in eWiSACWIS by Six Month Period



- As shown in Figure 2, the number of children identified as American Indian in the tribal count has risen slightly overall since the ICWA tab was instituted in the second half of 2010.
- Figure 3 shows that the percentage of all children in out-of-home care represented by Indian children also been slightly higher on average since the introduction of the ICWA tab.

Figure 4. Number of Children Identified as Meeting Federal ICWA Guidelines

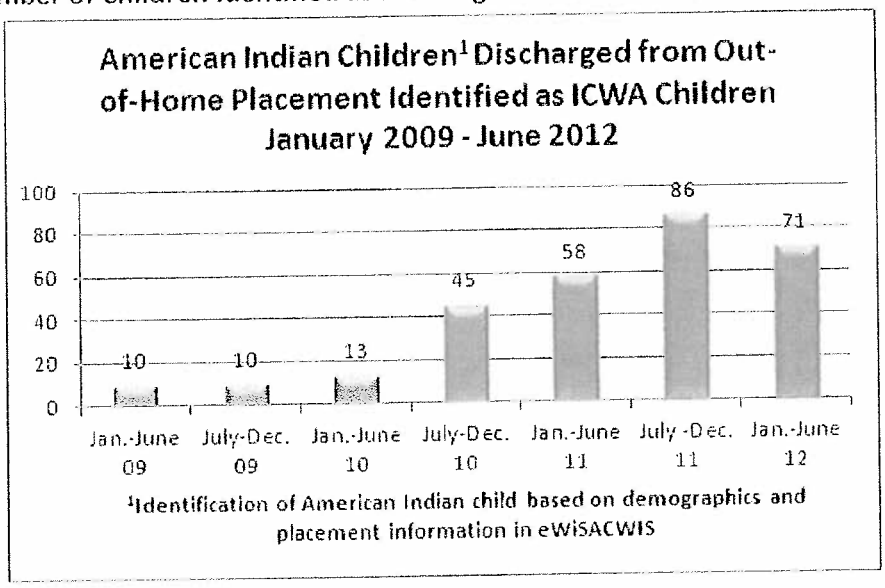
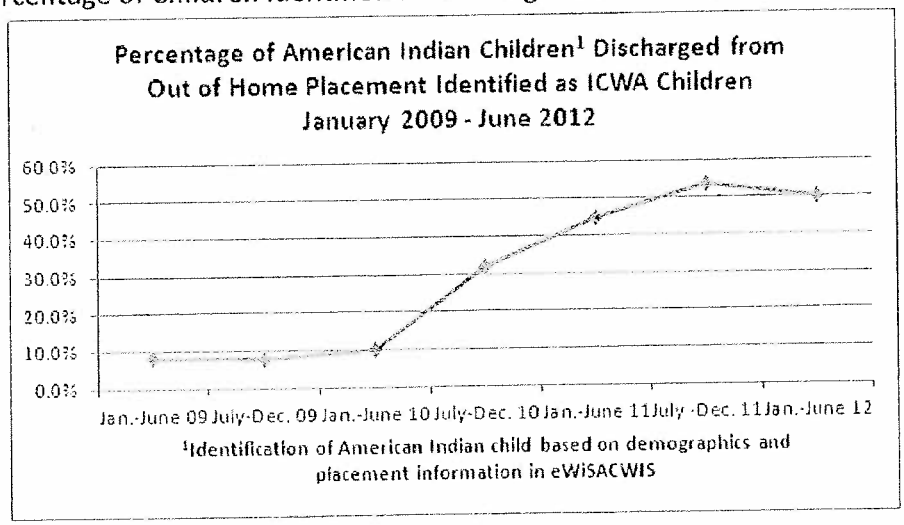


Figure 5. Percentage of Children Identified as Meeting Federal ICWA Guidelines



- As shown in Figures 4 and 5 both the number of children identified as subject to ICWA, and the percentage of American Indian children identified as ICWA children, increased markedly beginning in the latter half of 2010.
- Numbers of ICWA children continued to rise through the second half of 2011. This number decreased in the first half of 2012; however, percentages in Figure 5 suggest that this decrease is small when considered as a percentage of all children identified as American Indian in the tribal count.

Figure 6. Number of Notifications

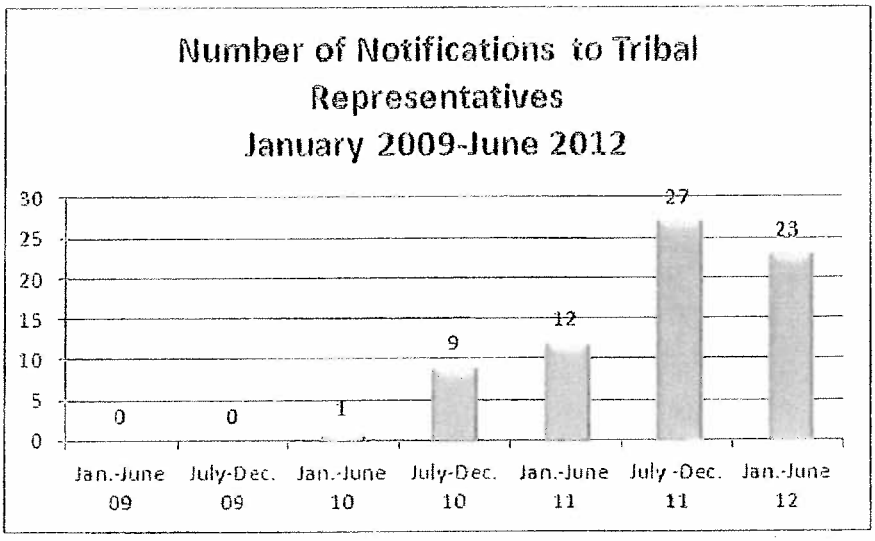
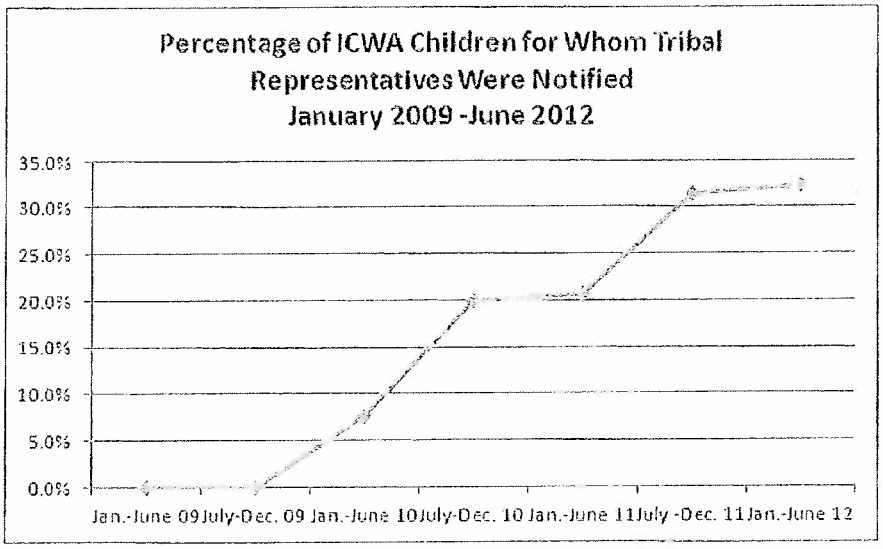


Figure 7. Percentage of Notifications



- As shown in Figure 6 the number of notifications to tribal representatives began to increase in the latter half of 2010. Numbers of documented notifications increased markedly in the first half of 2011 and decreased slightly in the first half of 2012.
- Figure 7 shows that the percentage of ICWA children for whom tribal representatives were notified has also risen, beginning in the first half of 2010.
- It should be noted that these figures reflect documentation of notice on the ICWA tab in eWiSACWIS. Notifications that are not generated using eWiSACWIS or entered by the worker (if notification is made by the court or through some other means) will not be captured.

Figure 8. Number of ICWA Children Placed with a Licensed Tribal Provider

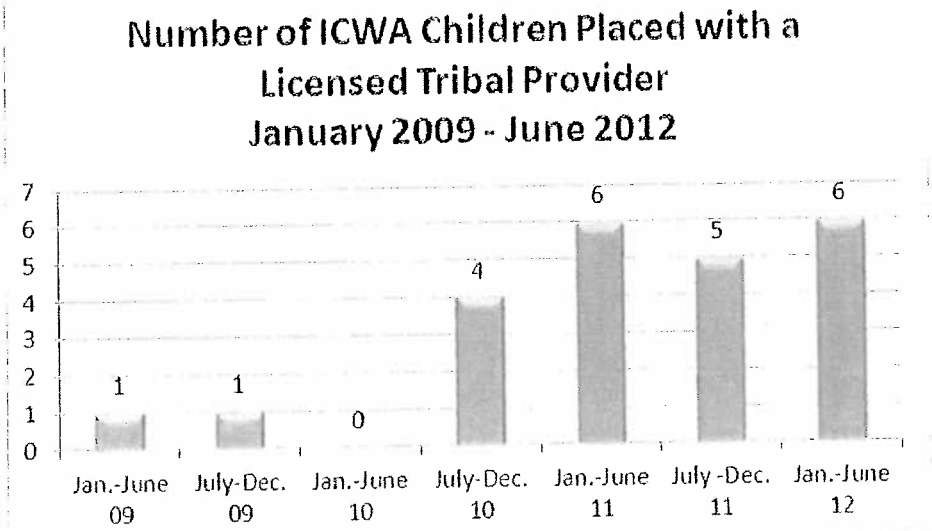
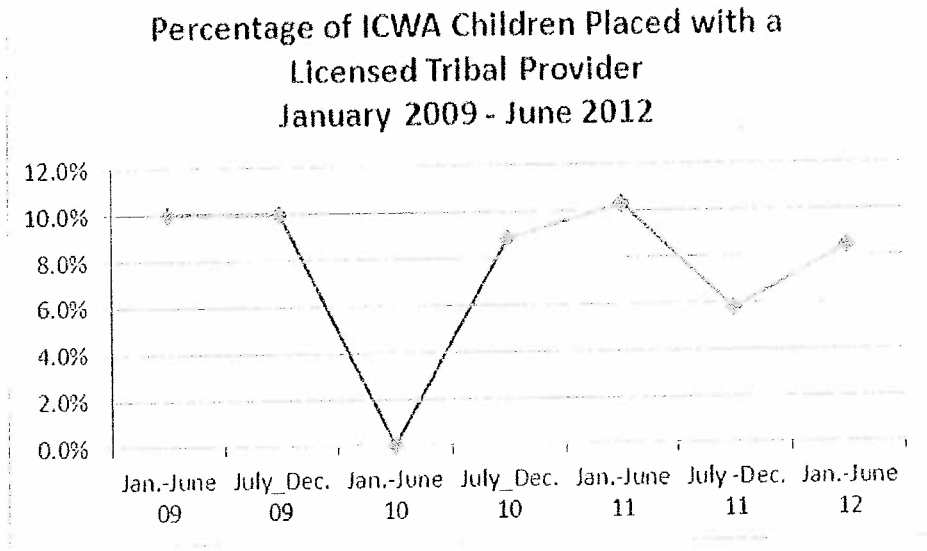


Figure 9. Percentage of ICWA Children Placed with a Licensed Tribal Provider



- As shown in Figure 8 numbers of IWCA children placed with licensed tribal providers began to increase in the second half of 2010.
- Although numbers of placements with licensed tribal providers have increased, numbers of ICWA children have also increased. Figure 9 shows that when considered as a percentage of ICWA children, these placements have not shown a pattern of increases over time.
- ICWA legislation specifies placement with relatives as the most preferred placement option, and placements with licensed tribal providers should be considered in concert with information about relative placement. In some cases licensed tribal providers are

also relatives and these placements are considered as placement with relatives in this report[4]. Moreover, it is reasonable to expect that placements with tribally approved providers will vary with the availability of tribally approved placement options.

Figure 10. Number of ICWA Children Placed with Relatives

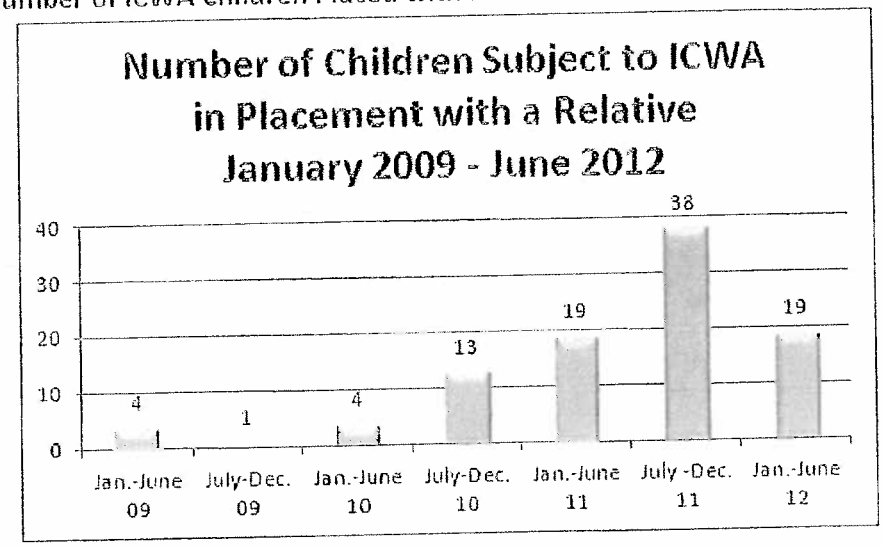
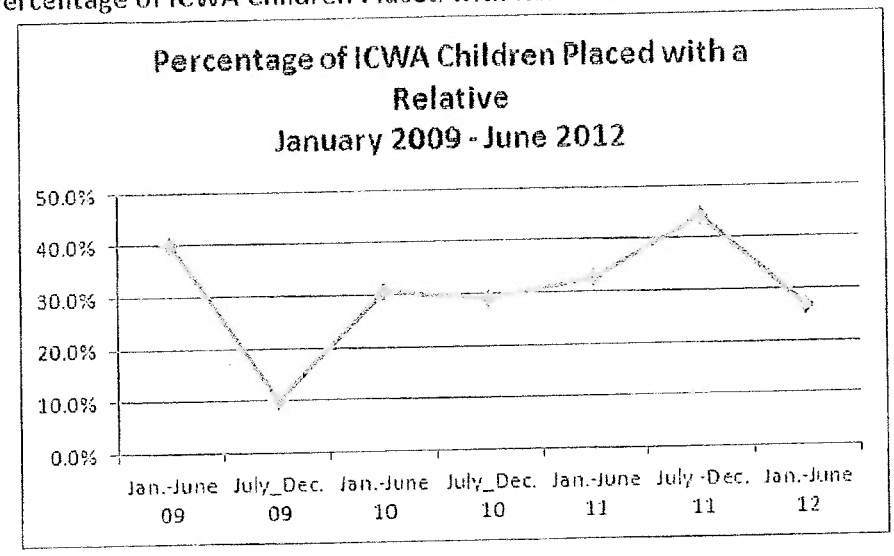


Figure 11. Percentage of ICWA Children Placed with Relatives

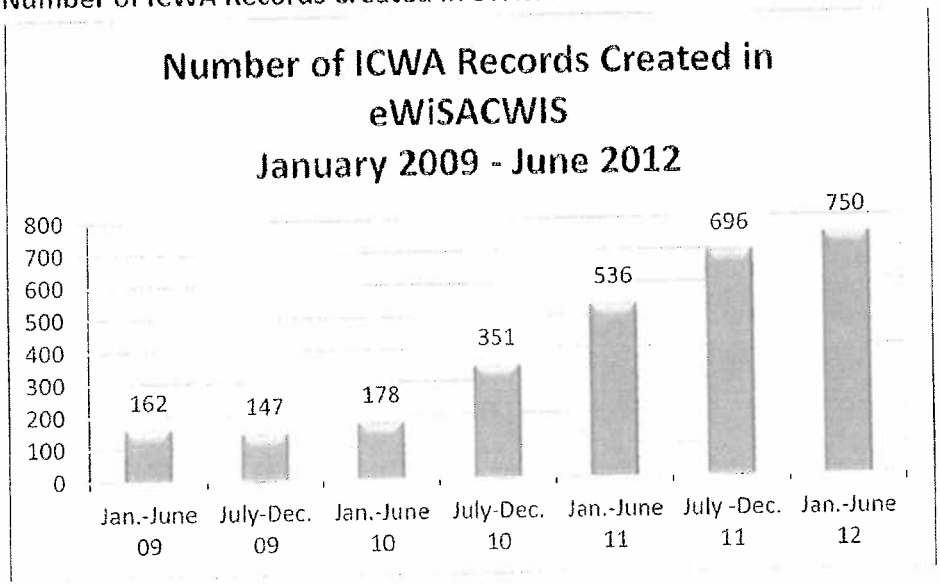


[4] 19 children statewide were indicated as both placed with tribal providers and as placed with relatives under "placement setting" eWiSACWIS. These children were counted as relative placements for purposes of this report in line with the order of ICWA placement preferences that specifies placement with family as the most preferred option.

- Figure 10 shows an increase in number of ICWA children placed with relatives beginning in the second half of 2010 and a substantial increase in the second half of 2011.
- Numbers for the first half of 2012 showed a decrease to the level observed in the first 6 months of 2011.
- Like placement percentages for placements with a licensed tribal provider, percentages of ICWA children placed with relatives have also been variable over time and have not shown clear increases.

As part of the WICWA project a change was made to eWiSACWIS in the latter part of 2010 to generate an ICWA tab to be completed for any child believed to be potentially subject to ICWA requirements. Prior to that time the tab did not exist; however, workers are trained that it is best practice to go back to complete this information for all American Indian children in out of home care. Figure 12 shows the number of ICWA records generated/completed from January 2009 through June 2012 by 6 month intervals. As shown in Figure 12, there has been a steady increase in the number of ICWA records completed since the inception of the tab.

Figure 12. Number of ICWA Records Created in eWiSACWIS



REGIONAL ANALYSIS:

Table 1 presents trends in tribal count, children identified who are subject to ICWA, notifications to the tribes, and placement in accord with ICWA preferred options by the five DHS Department of Children and Families Area Administrator Regions.

Table 1. Identification of Eligible Children and Compliance with the Indian Child Welfare Act (ICWA), by Region: January 2009 - June 2012

Region	Tribal Count							ICWA Child							ICWA Notice						
	T1	T2	T3	T4	T5	T6	T7	T1	T2	T3	T4	T5	T6	T7	T1	T2	T3	T4	T5	T6	T7
Northern	24	24	24	30	34	26	35	5	3	1	10	20	19	27	0	0	0	0	1	7	10
Northeastern	37	39	39	47	40	51	37	3	4	6	15	18	27	11	0	0	1	0	5	8	5
Southern	8	4	12	7	2	5	12	0	0	0	1	1	3	4	0	0	0	0	1	0	0
Southeastern	25	21	16	10	23	32	27	1	2	1	1	2	11	6	0	0	0	1	1	3	3
Western	10	24	26	27	20	25	18	1	0	5	10	10	13	12	0	0	0	3	0	4	1

Region	Tribal Provider							Relative Placement						
	T1	T2	T3	T4	T5	T6	T7	T1	T2	T3	T4	T5	T6	T7
Northern	0	0	0	3	1	1	2	1	1	0	0	3	2	7
Northeastern	0	0	0	0	5	3	1	3	0	2	5	5	16	1
Southern	0	0	0	0	0	0	0	0	0	0	1	1	1	2
Southeastern	0	0	0	0	0	1	0	0	0	1	0	0	6	1
Western	1	0	0	0	0	0	0	0	0	1	2	5	7	2

NOTE: T1 = Jan. - June 2009, T2 = July - Dec. 2009, T3 = Jan. - June 2010, T4 = July - Dec. 2010, T5 = Jan. - June 2011, T6 =July-Dec. 2011, T7 =Jan. – June 2012

15 COUNTIES WITH HIGHER TRIBAL POPULATIONS:

In this section, we present trends in tribal count, children identified who are subject to ICWA, notifications to the tribes, and placement in accord with ICWA preferred options for fifteen counties with the highest native populations. The raw numbers are presented in Table 2a for "tribal count," "ICWA child", and "ICWA notice" and in Table 2b for "tribal provider" and "relative placement". Figures 13a and 13b display the percent of the state totals each of these five categories that are accounted for by these fifteen counties. As shown in Figures 13a and 13b, these counties accounted for between 50% and 100% of statewide totals of children identified as American Indian in tribal count, as well as, children subject to ICWA. In the majority of time periods these counties also accounted for more than half of the notifications to tribal representatives and placements with approved tribal providers or relatives.

Table 2a. Identification of Eligible Children and Compliance with the Indian Child Welfare Act (ICWA), Top 15 Counties in Native Population: January 2009 - June 2012

County	Tribal Count							ICWA Child							ICWA Notice						
	T1	T2	T3	T4	T5	T6	T7	T1	T2	T3	T4	T5	T6	T7	T1	T2	T3	T4	T5	T6	T7
Ashland	2	3	3	5	4	1	6				4	3	1	5						1	3
Bayfield	4	5	5	6	7	2	4		1	1	2	5	2	4							1
Brown	19	16	18	20	23	22	14	2	2	2	4	11	10	6			1		3		2
Forest	3	2	2	4		1	2	1			1		1	2							
Jackson	3	4	4	6	6	6	8				4	4	3	6							
La Crosse	1	2	1	2	1		2	1	1					1							
Menominee	3	5	3	4	5	17	9		2	1	3	3	11	4					1	5	3
Milwaukee	24	16	13	8	15	22	22	1	2	1	1	1	6	6				1		3	3
Oneida	1		1		1	1							1								
Outagamie	1	8	3	6	5	5	5			3		1	3	1						3	
Sauk			2	1	1		4					1		2					1		
Sawyer	2	6	3	5	12	2	3	1			2	9	2	2					1	1	
Shawano	5	2	3	4			3	1			2										
Vilas	8	2		5	2	11	6	2	1		1	1	8	6						3	1
Wood	1	2	4		3	1	2					1									
Statewide	120	126	129	140	129	160	142	10	10	13	45	58	86	71	0	0	1	9	12	27	23

NOTE: T1 = Jan. - June 2009, T2 = July - Dec. 2009, T3 = Jan. - June 2010, T4 = July - Dec. 2010, T5 = Jan. - June 2011, T6 =July-Dec. 2011, T7 =Jan. – June 2012

Figure 13a. Percent of State Totals Accounted for by 15 Highest Native Population Counties

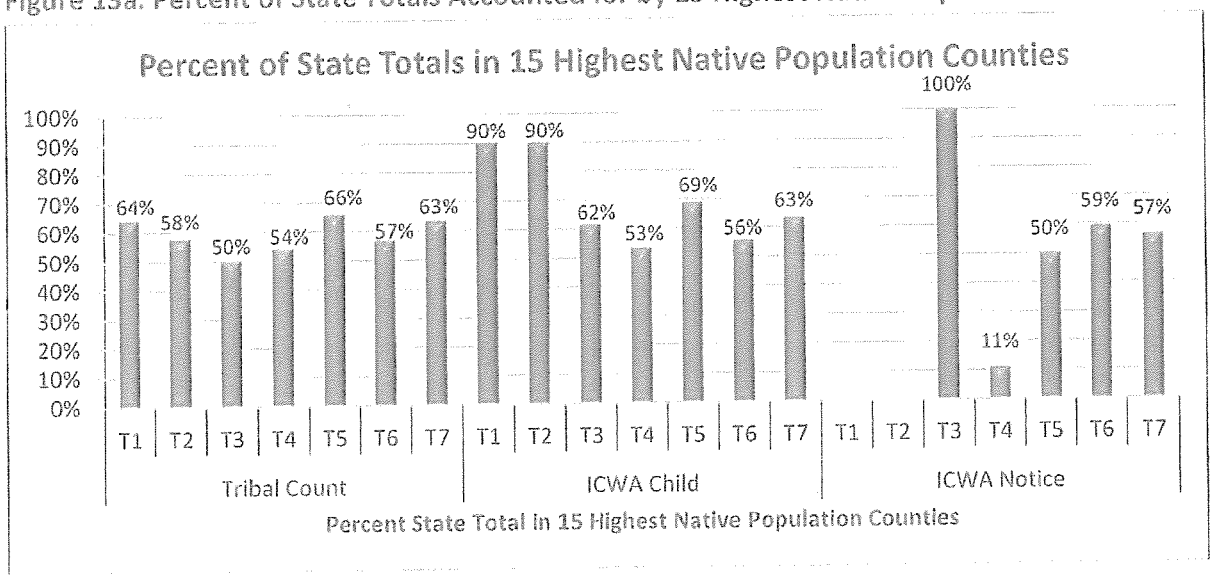
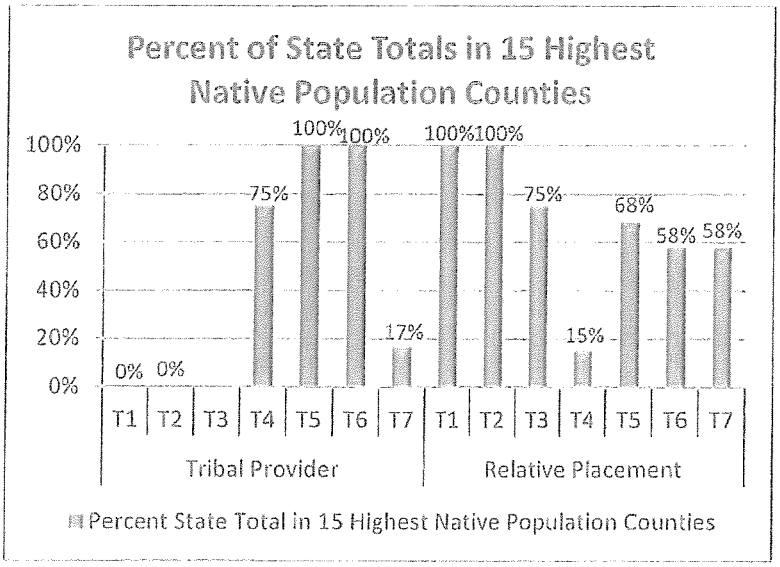


Table 2b. Identification of Eligible Children and Compliance with the Indian Child Welfare Act (ICWA), Top 15 Counties in Native Population: January 2009 - June 2012

County	Tribal Provider							Relative Placement						
	T1	T2	T3	T4	T5	T6	T7	T1	T2	T3	T4	T5	T6	T7
Ashland				3	1	1						1		4
Bayfield												1		
Brown					5	3	1	2			1	4	4	
Forest								1						
Jackson												4	2	2
La Crosse														
Menominee												1	9	1
Milwaukee						1				1			5	1
Oneida														
Outagamie										2				
Sauk												1		2
Sawyer														
Shawano								1			1			
Vilas									1				2	1
Wood												1		
Statewide	1	1	0	4	6	5	6	4	1	4	13	19	38	19

NOTE: T1 = Jan. - June 2009, T2 = July - Dec. 2009, T3 = Jan. - June 2010, T4 = July - Dec. 2010, T5 = Jan. - June 2011, T6 =July-Dec. 2011, T7 =Jan. – June 2012

Figure 13b. Percent of State Totals Accounted for by 15 Highest Native Population Counties



Note: Percentages in for tribal provider and in T1, T2, and T3 for relative placement are based on very small numbers, thus a small difference in number may appear as a large difference in percentage.

COUNTY ANALYSIS

Identification of Eligible Children and Compliance with the Indian Child Welfare Act (ICWA), by County
January 2009 - June 2012

County	Tribal Count							ICWA Child							ICWA Notice							Tribal Provider							Relative Placement						
	T1	T2	T3	T4	T5	T6	T7	T1	T2	T3	T4	T5	T6	T7	T1	T2	T3	T4	T5	T6	T7	T1	T2	T3	T4	T5	T6	T7	T1	T2	T3	T4	T5	T6	T7
Adams	1	1																																	
Ashland	2	3	3	5	4	1	6				4	3	1	5						1	3				3	1	1						1		4
Barron	1	7	5	3	1		2	1		2				1								1											1		
Bayfield	4	5	5	6	7	2	4		1	1	2	5	2	4							1					5	3	1	2			1	4	4	
Brown	19	16	18	20	23	22	14	2	2	2	4	11	10	6			1		3		2														
Buffalo																																			
Burnett	1	2	2	5	2	8	2				1	1	4	1						1															
Calumet			1																																
Chippewa	1		1																																
Clark																																			
Columbia						1																													
Crawford							1																											1	
Dane	2	1	6	4	1	3	5						3	2																			1		
Dodge		1	1	1							1																								
Door				1																													1	4	
Douglas		5		5		5	1				2		4	1					2		1														
Dunn			1																												1				
Eau Claire		4	2	1	4		1			1	1	3		1																					
Florence																																			
Fond du Lac	2		3		1	3	1																												
Forest	3	2	2	4		1	2	1			1		1	2																1					
Grant			2																																
Green			1																																
Green Lake																																			
Iowa	2																																		
Iron																																	4	2	2
Jackson	3	4	4	6	6	6	8				4	4	3	6																					
Jefferson	1																																		
Juneau																				1															
Kenosha		2		1	2	1						1																							

NOTE: T1 = Jan. - June 2009, T2 = July - Dec. 2009, T3 = Jan. - June 2010, T4 = July - Dec. 2010, T5 = Jan. - June 2011, T6 =July-Dec. 2011, T7 =Jan. – June 2012

Identification of Eligible Children and Compliance with the Indian Child Welfare Act (ICWA), by County

January 2009 - June 2012

County	Tribal Count							ICWA Child							ICWA Notice							Tribal Provider							Relative Placement						
	T1	T2	T3	T4	T5	T6	T7	T1	T2	T3	T4	T5	T6	T7	T1	T2	T3	T4	T5	T6	T7	T1	T2	T3	T4	T5	T6	T7	T1	T2	T3	T4	T5	T6	T7
Kewaunee	3			1																															
La Crosse	1	2	1	2	1		2	1	1					1																					
Lafayette			2	2	1		3							2							2														
Langlade	2	1		1							1																								
Lincoln																																			
Manitowoc		1	1		1							1																							
Marathon	2	2	3	1		5	7						3	5						2	3							2							2
Marinette				1	1	2					1	1	2						1														3		
Marquette																																			
Menominee	3	5	3	4	5	17	9		2	1	3	3	11	4					1	5	3											1	9	1
Milwaukee	24	16	13	8	15	22	22	1	2	1	1	1	6	6				1		3	3						1				1		5	1
Monroe			1	2	1	2	1				2		2	1				1		2	1											1		1	
Oconto	1		1	3		1	1				3		1																			3			
Oneida	1		1		1	1							1																						
Outagamie	1	8	3	6	5	5	5			3		1	3	1						3												2			
Ozaukee					1	2	2						1																				1		
Pepin	1					1																													
Pierce			3		2							1																							
Polk	2	1	4																																
Portage					1	2						1	1																						
Price					1																														
Racine		1			1	3							1																						
Richland																																			
Rock		1				1	2																												
Rusk		1				1	3							1																					
Sauk			2	1	1		4					1		2					1														1		2
Sawyer	2	6	3	5	12	2	3	1			2	9	2	2					1	1															
Shawano	5	2	3	4			3	1			2																		1			1			
Sheboygan		4	1	1	1	1	1																												

NOTE: T1 = Jan. - June 2009, T2 = July - Dec. 2009, T3 = Jan. - June 2010, T4 = July - Dec. 2010, T5 = Jan. - June 2011, T6 =July-Dec. 2011, T7 =Jan. – June 2012

Identification of Eligible Children and Compliance with the Indian Child Welfare Act (ICWA), by County

January 2009 - December 2011

County	Tribal Count							ICWA Child							ICWA Notice							Tribal Provider							Relative Placement						
	T1	T2	T3	T4	T5	T6	T7	T1	T2	T3	T4	T5	T6	T7	T1	T2	T3	T4	T5	T6	T7	T1	T2	T3	T4	T5	T6	T7	T1	T2	T3	T4	T5	T6	T7
St. Croix						2																													
Taylor					1																														
Trempealeau	1																																		
Vernon																																			
Vilas	8	2		5	2	11	6	2	1		1	1	8	6						3	1									1				2	1
Walworth						1																													
Washburn			3	5	4					2		1																					1		
Washington		1	1	1	4	1	2						1																						
Waukesha		1	2			2	1						2																						
Waupaca	1		1	4																															
Waushara		1	1				2																												
Winnebago	3	1	3	2	3		1				1	1																							
Wood	1	2	4		3	1	2					1																					1		

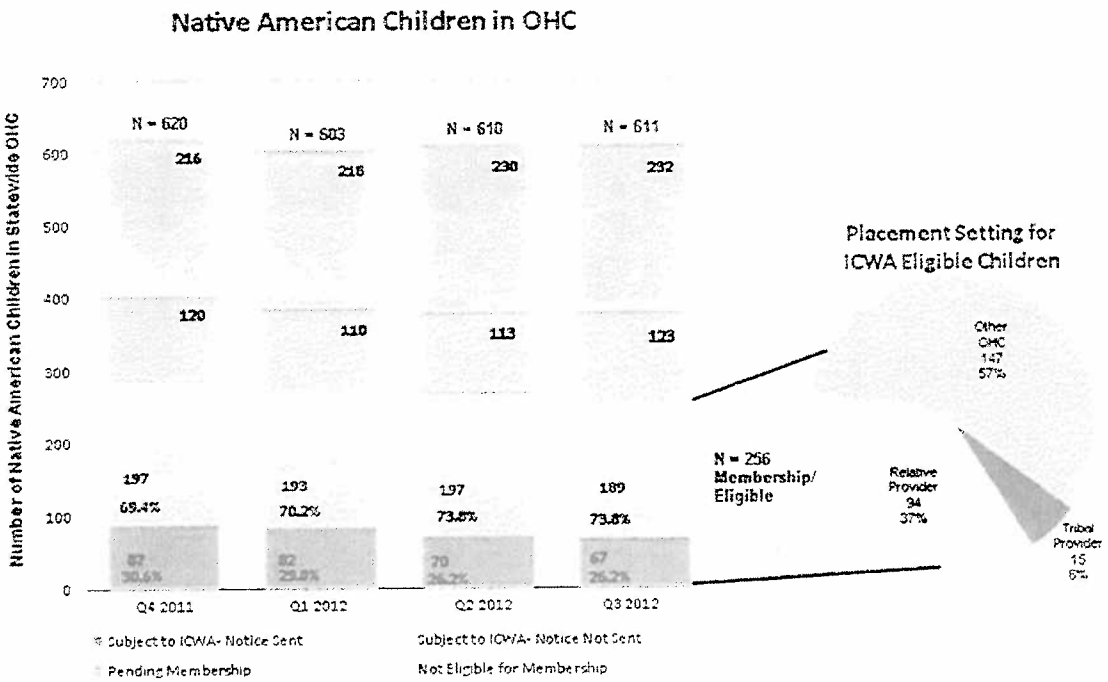
NOTE: T1 = Jan. - June 2009, T2 = July - Dec. 2009, T3 = Jan. - June 2010, T4 = July - Dec. 2010, T5 = Jan. - June 2011, T6 =July-Dec. 2011, T7 =Jan. – June 201

Safety and Permanence Statewide

ICWA

Wisconsin is abiding by the Indian Child Welfare Act.

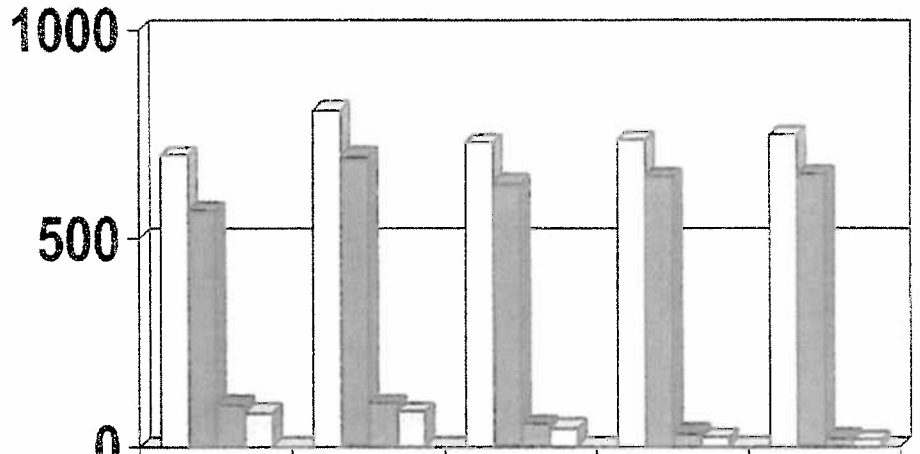
What is the progress of implementing the Wisconsin Indian Child Welfare Act statewide?



Analysis

- The bar graph includes all Native American children in out-of-home care statewide.
- In Q3 2012, 256 children were tribal membership eligible.
  - For 67 (26.2%) of the children, the county sent a notice to the tribe
  - For 189 (73.8%) of the children, the county has not yet sent a notice to the tribe
- The pie chart details the placement settings for ICWA eligible children in Q3 2012.

eWiSACWIS Data - ICWA Implementation



	2005	2006	2007	2008	2009
OH Placement	696	806	729	734	746
Subject to ICWA	567	695	631	649	654
ICWA Notice	99	101	54	31	17
Placement	81	83	43	22	13

© Marilyn Angel Wynn/Nativestock Pictures/Corbis

Our Children Are Sacred

WHY THE INDIAN CHILD WELFARE ACT MATTERS

By Judge Tim Connors

Seven generations ago someone was praying for us. We are the answer to their prayers. We take this responsibility seriously. When you are working with our children, it is sacred work. Our children are sacred.[1]

My mother Donna Lou was born in 1939. She and her family lived on Beaver Island in Michigan. After my grandmother died, my mother was separated from her brother and sent to be a domestic servant for a Mennonite minister and his wife in Fort Wayne, Indiana. This happened despite the fact that we had literally dozens of tribal family members who could have cared for her. Her Uncle Leo and his wife, for example, always wanted a daughter and would have loved to raise my mother. Unfortunately, she was sent away without any notice to her Indian family. While she was living with the Mennonites, she was forced to cut her hair outside of her Native tradition, prohibited from practicing Native American traditions, and prohibited from any contact with her Native American family and tribe. When she turned 17, she was forced into a loveless, arranged marriage. The marriage didn't last very long and she was on her own, alone in the world. She never had the courage to return home to her tribe because she felt so different and damaged. With her dark skin, black hair, and brown eyes she stood out as different from the majority of her peers in the 1950s and beyond. She never felt like she belonged anywhere. Without good examples of parenting, raising her children was a struggle for her. If my mother had been born after the passage of the Indian Child Welfare Act, and ICWA had been followed, she would've had a very different life and I would've had a very different mother.[2]

I first heard these words from Allie Greenleaf-Maldonado, a highly respected tribal attorney, while sitting in the back row of a lecture hall at the University of Michigan Law School. Maldonado and Matthew Fletcher, associate professor at the Michigan State University College of Law and director of its Indigenous Law Center, were presenting to Michigan's American Indian Law Student organization.

I came to learn that Allie's story was not an isolated incident. It was not even an exception. It was the general rule. And it happened during my lifetime, in my own backyard.

Our Federal Policy of Assimilation Began over 130 Years Ago

In 1878, Richard Henry Pratt, a military man turned educator, argued, "We can never make the Indians real, useful American citizens by any systems of education and treatment which enforce tribal cohesion and deny citizenship association." In time, Pratt advocated this

concept more bluntly: "Kill the Indian, save the man."[3]

Pratt began that process in 1879 when he opened the Carlisle Indian Boarding School in Carlisle, Pennsylvania. The school had been a military fort used during the Revolutionary War. For the next 40 years, over 10,000 Indian children were taken from their families and sent to Carlisle. Only 761 actually graduated. "Returning to the blanket," a term used to describe the resumption of traditional life, was seen as a sign of great failure.[4] But more disturbing were the statistics of those who never returned. Six boxes, catalogued as "dead files," sit in the National Archives. These boxes contain the names of the children who died at Carlisle or shortly after their return home. The published reports indicate children were dying at the school at a rate of three times the national average. Researchers suggest that these published reports were sanitized.[5]

From 1885 to 1895, for example, Apache children were sent to Carlisle from prisoner-of-war camps. Many of them died. During 1888 alone, a student died nearly every two weeks.[6] Too often both the Indian and the child were killed. Carlisle spawned an experiment carried out across our country for over 100 years. My wife Margaret and I went to Carlisle. We wanted to see where our federal policy of assimilation began. We met Barbara Landis, Carlisle Indian School biographer, who works at the local county historical society. Repeated inquiries came from Native Americans about the whereabouts of their ancestors, prompting her to create a website. Today, Native people can access resurrected information at www.carlisleindianschool.org.

We visited the school site. It is now a military college. The historical society will give you maps to guide you. The children's graves were moved and no longer represent the reality of the numbers who died. The displaced graves are adorned with gifts of tobacco, cloth, shells, and other remembrances from those who traveled to visit the remains. The "detention" rooms were actually prison cells, originally used for captured Hessian soldiers during the Revolutionary War. When children escaped, they were captured, brought back, and locked into these cells. You can still view them today. As I looked into one of them, I asked myself: What crime had these children committed, other than suffering acute homesickness?

Spotted Tail and Tribal Sovereignty

Many of the first "students" sent to Carlisle were from my native Michigan, as well as the children of Spotted Tail, related by marriage to Crazy Horse and a key figure in one of the landmark decisions regarding tribal sovereignty. In 1868, Chief Spotted Tail affixed an X on a treaty that recognized the Black Hills as part of the Great Sioux reservation and guaranteed exclusive use of the Black Hills to the Sioux people.

General George Custer changed all that. In 1874, he led an expedition into that protected land and announced the discovery of gold; the rush of prospectors followed. Within two years Custer attacked at Little Big Horn and met his demise. Spotted Tail kept his tribe out of the battle. A year later, the Black Hills were confiscated by the United States.

Crow Dog too was a Brule Sioux. He disagreed with Spotted Tail's actions and advocated a more forceful resistance for the survival of their tribe. In 1881, the two quarreled. Crow Dog survived.

In accordance with Sioux law, the tribal council met to address the reality of Spotted Tail's widow and offspring. The survival of the tribe was wholly dependent on the cooperation of all members in their migratory camp life. Punishment, retribution, or the application of an abstract system of justice or morality was not the driving force. Conflict termination and the peaceful reintegration of all members into a dependent coexistence was the necessity. The council ordered a transfer of items from Crow Dog to Spotted Tail's survivors for their continued support and the matter was resolved. Or so they all thought.[7]

The Territorial District Court of Dakota didn't like the Tribal Court's decision. Crow Dog was arrested, tried for murder, convicted, and sentenced to death. Crow Dog then petitioned for *Writs of Habeas Corpus* and *Certiorari* to the U.S. Supreme Court. Less than one month before his scheduled execution, the Supreme Court spoke: Crow Dog was to be set free. The Territorial District Court of Dakota had no jurisdiction over physical altercations between tribal members on Indian land. Title 28, § 2146 of the U.S. Revised Statutes granted "exclusive jurisdiction over such offenses . . . to the Indian tribes respectively" and Spotted Tail's X on the 1868 treaty didn't abrogate that right.[8]

Within two years, however, Congress enacted the Major Crimes Act extending federal jurisdiction to major felonies occurring between Indians in Indian country. This Act still rules today. Some opine that Congress would not have acted with such alacrity if it had been Spotted Tail (the perceived pacifist) who had survived Crow Dog (the perceived militarist). In any event, it was almost 100 years later before the Supreme Court upheld judgment in favor of the tribe, against the United States, for the illegal taking of the Black Hills.[9]

Two years before his death, Spotted Tail met with Carlisle's Pratt on the Rosebud reservation in the Dakota Territory. Pratt told Spotted Tail he had been sent to enroll his children in the school. Spotted Tail was skeptical. This was the same government that had violated the Black Hills treaty. Pratt told him, had the Indians been able to read what they were signing, they would have understood. The Indian's command of the English language, Pratt argued, was necessary to prevent future treaty violations. Reluctantly, Spotted Tail gave Pratt five of his children. When the children arrived at the empty military post on October 6, 1879, there was no food, no clothing, and no bedding. The children slept on the floor in their blankets.[10]

A year later Spotted Tail went to Carlisle himself. He was enraged. He condemned the military regime, the children's "soldier uniforms," the shorn hair, and his youngest son's incarceration in the prison cell. He immediately took his children out of Carlisle. He demanded the

return of all of the children from his tribe. This demand was refused. One of these children, Earnest White Thunder, begged to go home with Spotted Tail. He stowed away on the return train that Spotted Tail and his children took. He was discovered and forcibly taken back to Carlisle. He fell ill and was sent to the hospital, where he refused all medicine and food. He died less than two months after arriving at Carlisle.

Casualties of Assimilation

Carlisle had close ties with the Mount Pleasant Indian Industrial School in my native Michigan. I learned from tribal members of my generation that the boarding school experience for their parents was also traumatic. In fact, this intergenerational trauma was nationwide and still alive.

One tribal advocate recently educated a group of state court judges at a Tribal Leadership gathering held with members of the National Council of Juvenile and Family Court Judges (NCJFCJ). He explained to us the effects of colonization on tribal communities. Colonization and our subsequent federal policies had been a process of dismembering: dismembering of community, dismembering of spirituality, dismembering of language, dismembering of culture. Our tribal neighbors now are in a process of recovery from these policies. Part of the process of recovering is remembering. For many of our neighbors, remembering is painful.

I remember clearly the profundity of this gentleman's next comment:

> My mother is in her eighties. Even today, when I go to advocate on behalf of Indian rights she says, "Be careful what you say." My mother's generation was a generation of fear. Mine was a generation of anger. Sometimes in remembering we react with anger, even when an olive branch is being held out. But the generation that I am now hiring to do this work does not have fear. They do not have anger. They do have hope. This is where I like to think we are, and where we can stay.

Seeds of Self-Determination

The Supreme Court has determined that Congress has "plenary and exclusive authority" over Indian affairs through the Commerce Clause of the U.S. Constitution.[11] Nonetheless, views of the executive and judicial branches also have influenced federal policy toward tribal nations. *Worchester v. Georgia* (1832) is an illustrative example.[12] The state of Georgia wanted control in Cherokee land, contrary to their treaty with the United States. The U.S. Supreme Court concluded:

> The Cherokee Nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and acts of congress.

Upon learning of this decision, President Andrew Jackson reputedly said, "John Marshall has made his decision, now let him enforce it." Jackson did nothing to enforce the decision, and the infamous Trail of Tears and a federal policy of forced removal followed.[13]

One hundred thirty-eight years later another president had a radically different view. On July 8, 1970, President Richard Nixon addressed Congress on the country's then-existing policy of forced termination:

> It is long past time that the Indian policies of the Federal government began to recognize and build upon the capabilities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.

Birth of the Indian Child Welfare Act and Self-Determination

On April 8, 1974, Congress began a series of hearings regarding Indian child welfare in the United States. The historical record can be found on the website of the Native American Rights Fund at www.narf.org. The statistical evidence received documented allegations that the removal of Indian children from their tribes and families was of massive proportions. The policies had generational, long-standing devastating effects.

Further testimony indicated the problem was widespread. In Montana, the ratio of Indian foster care placement was at least 13 times greater than for non-Indian children. In South Dakota, 40 percent of all adoptions made by the state were of Indian children, yet Indians made up only 7 percent of the population. In the state of Washington, the Indian adoption rate during this time was 19 times greater than for the non-Indian population.

Similar results were found in the Great Lakes region. In Michigan, an Indian child was 390 percent more often removed from his home than a non-Indian child; in Minnesota, 520 percent more often removed; and in Wisconsin, 1,560 percent. Poverty, poor housing, lack of modern plumbing, and overcrowding were often cited by social workers as proof of parental neglect and grounds for termination of parental rights. Physical abuse was cited in just 1 percent of the cases.

Judge Tim Connors has served as a State Court Judge in Ann Arbor, Michigan, since 1991. He teaches American Indian Law, Family Law, and Civil and Family Trial Advocacy at the University of Michigan Law School, Thomas M. Cooley Law School-Ann Arbor Campus, and Wayne State University Law School.

Removal was often done without due process of law. Representation by counsel, expert testimony, and indeed the adjudicatory process itself were oftentimes nonexistent. In those states or communities that did not have a strong tribal presence, even less ability to monitor such actions existed. As a result, Congress passed the Indian Child Welfare Act in 1978. The Act is remedial in nature and attempts to change the goals of federal policy toward Indian children.[14]

Our federal policy toward our sovereign nations has pinballed between negotiation, removal, extermination, assimilation, termination, and now, finally, self-determination.

In January 2011, the NCJFCJ Board of Trustees passed the following resolution:

> RESOLUTION IN SUPPORT OF TRIBAL COURTS
>
> WHEREAS, the tribal courts serve the children and families of sovereign nations with their respective authority and with equal responsibility as the state courts serve their constituencies; and
>
> WHEREAS, the National Council of Juvenile and Family Court Judges (hereinafter referred to as the "National Council") acknowledges that the tribal courts have historically not been regarded as equal in status with the state courts and that, as a result, the tribal courts and the children and families served by the tribal courts have been denied many of the resources available to the state courts; and
>
> WHEREAS, the National Council in serving children and families, recognizes that tribal and state courts are equal and parallel justice systems; and
>
> WHEREAS, the National Council acknowledges the critical work of the tribal judges and the tribal judicial leadership organizations that support the important work of tribal judges to develop and implement effective practices, and to strive to provide the supports for tribal courts to effectively serve native children and families; and
>
> WHEREAS, the National Council is committed to partnering with tribal courts and judges as allies consistent with the commitment of all courts to meet the needs of all children and families served by the state courts and tribal courts without discrimination or favor; and
>
> WHEREAS, the voice of tribal court judges is a necessary component in NCJFCJ's ability to fulfill its mission; and
>
> WHEREAS, the National Council recognizes that children and families are best served within the contexts of their community and honors the relationship that tribal courts have within their Tribes.
>
> BE IT THEREFORE RESOLVED that the NCJFCJ Board of Trustees is, and shall be, committed to engaging the tribal courts as full partners in fulfilling the mission of the National Council and in meeting the needs of all children and families served by the state and tribal courts, complying with the letter and the spirit of all laws effecting [sic] native children and families including, but not limited to, the Indian Child Welfare Act, the Adoption and Safe Families Act in a context that supports tribal culture, the Tribal Law and Order Act, and the full faith and credit provisions of the Constitution and of federal laws of the United States.
>
> BE IT FURTHER RESOLVED that the National Council shall work with the tribal courts, tribal governing bodies, and other tribal authorities to ensure equal treatment of, and resources for, all native families and children at all levels of government.

Final Thoughts

The NCJFCJ Board of Trustees' Resolution is an important step in bridging the existing gap between tribal/state court relationships. Legal communities across the country likewise urge us. The State Bar of Michigan's Judicial Crossroads Task Force, for example, recently found:

> [t]he courts are pivotal players in the child welfare system, and the need for courts to respond more effectively than in the past to child welfare problems is urgent. As Michigan's economy has deteriorated, our child welfare caseloads have increased, but the resources to deal with abuse, neglect, juvenile justice, and homeless and runaway youths are diminishing. Failure to deal early and effectively with child welfare problems generates greater costs in later years.[15]

It went on to recommend:

- Support the adoption of Federal Indian Child Welfare Act Concepts into Michigan Law.
- Institutionalize partnerships between the Michigan Supreme Court/SCAO and Tribal Courts, the Michigan Indian Judicial Association, lawyers, and other stakeholders in Indian/First Nation issues to improve meaningful access to justice in Michigan State Courts.[16]

In the last decade, the Bureau of Justice Assistance, a component of the U.S. Department of Justice, has provided funding for tribes to establish and sustain justice systems. It also recognizes the value of bringing tribal, state, and federal justice entities together to talk and listen. The National Tribal Judicial Center (NTJC) in Reno, Nevada, has facilitated a number of these "gatherings." I have attended them, and they are enriching. It is a tremendous opportunity for state court judges to learn from our tribal courts how they address their justice needs in culturally appropriate ways. As a state family court judge, I was particularly impressed with the philosophical approach our tribal neighbors bring to their litigants. It was clear to me that our state system could

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a party to the action, unless the objecting party claims some personal right or privilege with regard to the documents sought. As a result, the court concluded that an individual has a personal right in information in his or her profile and inbox in the same way that an individual has a personal right in employment and bank records, and as such the plaintiff in the case had standing to bring a motion to quash. The net effect of the court's holding was that the account web pages and communications that were not publicly available were protected from disclosure by the Stored Communications Act.

Final Comments

Generally, the opinions discussed above interpreting the Stored Communications Act are understood to provide that, while the court may not enforce a civil discovery subpoena directed to Internet and e-mail service providers themselves to produce a user's private communications, the court may order the litigant to turn over the information. Accordingly, when a party seeks e-mail and other electronic information, the direct route of first seeking the discovery from the party or witness should be considered. When one party seeks to obtain electronic information and communications from an Internet or e-mail service provider by use of a civil discovery subpoena, be aware of the limitation imposed by the Stored Communications Act. The limitation? The antithesis of the famed e-mail announcement that we grew to know and love in the early days of the Internet, namely, a response by Internet and e-mail service providers to any subpoena that translates roughly to "We've got mail, and you can't have it!" ■

Endnotes

1. Quantum Computer Service, located in Vienna, VA, came into being in 1985. In 1991, Quantum was renamed "America Online."

2. *In re Subpoena Duces Tecum to AOL*, 550 F. Supp. 2d 606, 610 (E.D. Va. 2008).

3. Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1216–17 (2004).

4. 44 Cal. Rptr. 3d 72, 76–77 (Cal. Ct. App. 2006).

5. 717 F. Supp. 2d 965 (C.D. Calif. 2010).

Indian Child Welfare Act

continued from page 36

benefit from the tribal courts approach. It was also clear to me that there was value in NTJC's purpose: recognizing the necessity for increased collaboration, cooperation, and communication through increasd dialogue among the three justice communities. As judges, our commitment to these principles will foster positive change for each of our justice systems.[17]

Recognition and enforcement of the Indian Child Welfare Act in our state courts is fundamental to the survival and integrity of our federally recognized tribes. A respectful government-to-government alliance can, and should, be our reality. In honoring, upholding, and enforcing the Indian Child Welfare Act in our state courts, we act in accordance with the judicial oath of office we all took in order to serve. It is our duty, our legal obligation, and our moral responsibility. ■

Endnotes

1. Tribal Court Judge to National Council of Juvenile and Family Court Judges, Tribal Judicial Leadership Gathering, Dec. 2010.

2. Allie Greenleaf-Maldonado, Asst. Gen. Counsel, Little Traverse Bay Band of Ottawa Indians, Harbor Springs, Mich.

3. Genevieve Bell, Telling Stories out of School: Remembering the Carlisle Indian Industrial School 1879–1918, at 38, 39 (June 1998) (Ph.D. dissertation, Stanford University).

4. *Id.* at 331.

5. *Id.* at 386.

6. *Id.* at 387, 388.

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